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FISHER WAYLAND COOPER LEADER & ZARAGOZA L.L.P.
2001 PENNSYLVANIA AVENUE N.W.
SUITE 400
WASHINGTON D.C. 20006-1851
TELEPHONE 202-659-3494

GLENN S. RICHARDS
(202) 775-8678

FACSIMILE
202) 296-6518

INTERNET
grichards@fwclz.com

WEBSITE
http://www.fwclz.com

0+1

September 17, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

DELIVERY VIA COURIER

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Petition Of Nevadacom For Expedited Declaratory Ruling That Telegraphic Money Order Service Is An Information (Enhanced) Service And Not Subject To State Regulation

Dear Ms. Salas:

On behalf of Nevadacom, Inc., we hereby submit for filing an original and four copies of its above-captioned Petition for Expedited Declaratory Ruling.

Please refer all questions and correspondence regarding this filing directly to the undersigned.

Very truly yours,

Glenn S. Richards
Counsel for Nevadacom, Inc.

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Petition Of NEVADACOM For Expedited Declaratory Ruling That Telegraphic Money Order Service Is An Information (Enhanced) Service And Not Subject To State Regulation	)	File No.

PETITION OF NEVADACOM FOR EXPEDITED DECLARATORY RULING

Glenn S. Richards
Susan M. Hafeli
Fisher Wayland Cooper Leader & Zaragoza LLP
2001 Pennsylvania Avenue N.W.
Suite 400
Washington, D.C. 20006-1852
Telephone: (202) 775-3494
Facsimile: (202) 296-6518

September 17, 1999

SUMMARY

In 1979, the Commission ended Western Union's ("WU's") *de facto* monopoly in domestic public message telegraph service ("PMTS"). Though not precisely defined, PMTS encompasses a broad category of record services available for use by the general public. This broad category includes telegraphic money order service – a service which WU detariffed in 1979 and the Commission described in 1980 as a "competitive enhanced service."

As an enhanced service, telegraphic money order service has been and is governed by the regulatory framework adopted by the Commission in its *Computer II Inquiry*. Under that framework, state regulation that erects entry barriers to the provision of money transfer services by record carriers is subject to federal preemption as it violates the Commission's stated policies favoring open entry and deregulation. Thus, Nevadacom requests a declaratory ruling that any state law, rule, or regulation that acts to bar or inhibit the provision of money transfer service by record carriers is preempted by federal law to the extent necessary to correct such inconsistency with federal policy.

Nevadacom requests an expedited ruling due to the drafting of a uniform Model Act governing *inter alia* money transfer services provided by record carriers. The proposed Model Act would adversely impact record carriers by creating substantial barriers to entry and imposing onerous regulation. By granting Nevadacom's Petition, the Commission can alert the NCCUSL that the draft Act violates federal communications policy applicable to record carriers providing money transfer service and that, absent an applicable exemption, any state act modeled thereon would be subject to limited federal preemption.

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PETITION OF NEVADACOM FOR EXPEDITED DECLARATORY RULING

Nevadacom, Inc. ("Nevadacom") seeks an expedited declaratory ruling from the Federal Communications Commission (the "Commission") confirming that telegraphic money order service is an "information service" as that term is defined in the Communications Act of 1934, as amended ("the Act"). Further, Nevadacom seeks a declaratory ruling that any state law, rule, or regulation that acts to bar or inhibit the provision of money transfer service by record carriers is preempted by federal law to the extent necessary to correct such inconsistency with federal policy. Nevadacom requests an expedited ruling due to the drafting of a Model Act governing *inter alia* money transfer services provided by record carriers which, if adopted by the states, will erect substantial entry barriers and impose onerous regulation.

The Administrative Procedure Act and the Commission's rules authorize the Commission to "issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e) and 47 C.F.R. § 1.2. Commission action pertaining to telegraphic money order service by

record carriers has created substantial uncertainty regarding *inter alia* the regulatory status of this service. As a result, record carriers seeking to provide telegraphic money order service are subject to onerous state requirements that present a significant barrier to entry in this market. Accordingly, Nevadacom respectfully requests that the Commission issue a declaratory ruling confirming that telegraphic money order service – referred to interchangeably as money transfer service provided by record carriers – is an information service, which may not be regulated by the states.

I. INTRODUCTION

Nevadacom is a domestic and international provider of common carrier record communications service, referred to by the Commission interchangeably as "public record," "public message," or "telegraph" service.[1/] Nevadacom has received authority from the Commission to provide international common carrier services pursuant to § 214 of the Act. (FCC File No. ITC-95-620). In compliance with its regulatory obligations, Nevadacom, a reseller, has filed with the Commission tariffs governing both its domestic and international provision of record communications service.

Nevadacom's currently-tariffed services include those services that traditionally have been considered public record or telegraph service, including various types of telegram services

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1/ *See, Domestic Public Message Services, Application of Graphnet Systems, Inc.*, 71 FCC 2d 471, 506 (1979), *reconsideration*, 73 FCC 2d 151 (1979) hereinafter *Graphnet Systems Order*) and discussion below.

and telex service.[2] *See* Tariff FCC Nos. 1 and 2. Nevadacom intends to introduce telegraphic money order services, another service traditionally considered a telegraph offering.

II. PUBLIC MESSAGE SERVICE REFERS TO A BROAD CATEGORY OF SERVICE THAT HISTORICALLY INCLUDED TELEGRAM AND MONEY ORDER SERVICES

Pursuant to its authority to "regulat[e] interstate and foreign commerce in communication by wire and radio," the Commission historically exercised Title II regulation over telegraph companies.[3] *See* 47 U.S.C. § 151 et. seq.

In 1979, the Commission ended Western Union's *de facto* monopoly in domestic public message telegraph service ("PMTS") and opened the market to competition. *In the Matter of Domestic Public Message Services, Application of Graphnet Systems, Inc.*, 71 FCC 2d 471, 521-523, *reconsideration*, 73 FCC 2d 151 (1979) (hereinafter *Graphnet Systems Order*).[4] In that Order, the Commission declined "to define precisely the contours of public message service." Rather, the Commission explained, the service "includes a variety of public record (or message) offerings generally involving acceptance of a message from the public, electronic transmission of the message, production of a physical hard copy, and ultimately some form of delivery to its

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[2] To send a telegram via Nevadacom, customers dial an 800 number to reach a company representative. The company representative transcribes the customer's message and has it delivered to the intended recipient via fax, hand delivery, telephone, or mail. The charge for the telegram is based on the number of words and the method of delivery.

[3] Historically telegraph companies (or "record carriers") provided non-voice (or "record") communications, while telephone companies provided voice communications.

[4] At the end of its analysis of the broad market for the transmission of written messages, the Commission concluded that "an open entry policy in the public record service [market] will benefit the public interest. . . . [We shall open this market to entry by carriers other than [Western Union] in order to achieve the purpose of the Communications Act." *PMS* at 521, 523-524.

recipient." *Id.* at 505-506. "For purposes of this decision," the Commission concluded, "we are using the terms 'public record service' and 'public message service' interchangeably to refer to a broad category of service which includes telegram (or PMTS), Mailgram, and other record services which would be available for use by the general public." *Id.* The Commission's decision not to adopt a rigid definition of public message service was noted approvingly by the court in *Western Union Telegraph Company v. FCC*, 65 F.2d 1126 (D.C. Cir. 1985):

> Although the FCC has, in the past, defined PMS in the way in which WUTC uses in this argument [i.e., telegrams and telegraphic money orders but excluding telex] (footnote omitted), it did not do so in [the *Graphnet Systems Order*]. Indeed, in that decision, the FCC explicitly declined to adopt any rigid definition of PMS. (Citation and quote omitted). This was not an arbitrary refusal to undertake a difficult task; the Commission determined that artificial segmentation of the written-message transmission industry would not be in the public interest. (Citation omitted.) . . . The Commission's analysis of this broad market certainly was reasonable; there are no really discrete submarkets in this area. Even telex and telegrams compete for the same customers and are equivalent in many ways.

Id. at 1145-46.[5/]

Some of the "other record services available for use by the general public" included telegraphic money order services, which Western Union provided on a tariffed basis at the time the Commission adopted its *Graphnet Systems Order*. For the purposes of the *Graphnet Systems* proceeding, Western Union defined public message service to include domestic telegram,

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[5/] Further, the Commission has never required that public message service be transmitted or delivered in a particular manner or via the carrier's own facilities. Such a requirement would be inconsistent with the Commission's recognition of the role of resale in the provision of record carrier services. *Graphnet Systems Order* at 504. It also would conflict with long-standing Commission policy that considers a "pure reseller" – a carrier that neither owns nor operates its own telecommunications facilities – to be a telecommunications carrier. *See, Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261 (1976), *aff'd sub nom. AT&T v. FCC*, 572 F.2d 17 (2d.Cir), cert. denied, 439 U.S. 875 (1978)

telegraphic money order service, Mailgram, and the domestic handling of international telegrams.[6] *Graphnet Systems Order* at 473, 505. Western Union's definition was unchallenged by the Commission, which simply distinguished between Western Union telegram services and its telegraphic money order services. *Id.* at 506.[7]

III. STATES MAY NOT REGULATE MONEY TRANSFER SERVICES PROVIDED BY RECORD CARRIERS

In March 1979, shortly after release of the *Graphnet Systems Order*, Western Union filed Transmittal No. 7485 canceling its money order service tariff, F.C.C. No. 229, effective May 17, 1979. The Commission subsequently rejected a challenge to this detariffing and affirmed the cancellation, treating Western Union's telegraphic money order, or money transfer, service as an "competitive enhanced service" under the comprehensive framework it had recently adopted in

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[6] Two years earlier the Commission questioned whether Western Union's experimental Commercial Money Order service was a common carrier communications service that must be provided on a tariffed basis. The Commission, however, appears to have issued no order specifically addressing this issue. *Western Union Telegraph Co. New and Revised Pages to Tariff F.C.C. No. 229,* Transmittal No. 7177, 65 FCC 2d 374, 1977 FCC LEXIS 895 (Apr. 1977).

[7] The Commission subsequently initiated a proceeding to revise its rules to reflect the competitive provision of public message service authorized in its *Graphnet Systems Order*. *Regulatory Policies Concerning the Provision of Domestic Public Message Services by Entities Other than the Western Union Telegraph Company and Proposed Amendment to Parts 63 and 64 of the Commission's Rules*, 75 FCC 345, 360, 373-374 (1980) (hereinafter *Regulation of Domestic Public Message Service*). Once again, it declined to adopt a precise definition of public message service, even though it had proposed one in its Notice of Proposed Rulemaking, believing that such a definition "would not serve any beneficial purpose nor aid in achieving our regulatory goal of enhanced public benefits accomplished through encouraging entry into what may still be called (generically) public message services." *Regulation of Domestic Public Message Service* at 374.

its *Computer II Inquiry*.[8] *Western Union Telegraph Company, Transmittal No. 7485*, Memorandum Opinion and Order by the Chief, Common Carrier Bureau (rel. Aug. 6, 1980) (copy attached hereto). This regulatory reclassification was noted a decade later in a complaint case involving Western Union's money transfer service. *McDermott v. Western Union Telegraph Co.*, 746 F.Supp.1016, 1020 (D.Cal. 1990) (finding that federal law applied to plaintiff's state causes of action). As the *McDermott* court recognized, "Western Union no longer has tariffs covering money transfer services on file with the FCC" because the FCC was "declining to exercise the full scope of the jurisdiction granted to it by Congress." *Id.* at 1020.

In its *Computer II Inquiry*, the Commission had found that enhanced service providers – unlike providers of "basic" services – were not common carriers within the meaning of the Communications Act of 1934 and hence were not subject to tariffing obligations and other regulation under Title II of that Act; the Commission, however, stated that it retained ancillary jurisdiction over these providers. *Computer II Inquiry* at 430-435. The 1996 Act codifies, with some minor modifications, the regulatory framework that the Commission adopted in its landmark *Computer II Inquiry*. As the Commission explained, "the 1996 Act's definitions of telecommunications service and information service essentially correspond to the pre-existing categories of basic and enhanced services, in that they were intended to refer to separate categories of services . . . . 'the differently-worded definitions of "information services" and "enhanced services". . . should be interpreted to extend to the same functions.'" *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress at para. 33 (rel.

8/ *Amendment of Part 64.702 of the Commission's Rules and Regulations*, Final Decision, 44 RR2d 669, 77 FCC 2d 384 (1980) (subsequent history omitted) (*Computer II Inquiry*).

Apr. 10, 1998), citing *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 5 CR 696, 11 FCC Rcd 21905 (1996) at para. 102 (subsequent history omitted). Thus, under the 1996 Act as interpreted by the Commission, telegraphic money order service – also referred to as money transfer service provided by record carriers – is an information service subject only to the Commission's ancillary jurisdiction.

As part of the comprehensive framework adopted in its landmark *Computer II Inquiry*, the Commission announced its intention to preempt inconsistent state regulation of enhanced, or information, services. *Computer II Inquiry*, 77 FCC 2d at 428-429; *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II Inquiry)*, Memorandum Opinion and Order on Further Reconsideration, 88 FCC 2d 512, 541-542 (1981) ("[A] state regulatory authority. . . may take action so long as it does not conflict with our policies . . . . We will promptly examine allegations or complaints of conflicts between state regulations and our national policies and, if necessary, preempt inconsistent regulations through appropriate proceedings").[9]

Pursuant to the Supremacy Clause of the U.S. Constitution, Congress has the power to preempt state laws or regulations. See e.g., *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368 (1986) (*Louisiana PSC*). The Supreme Court, however, has made it clear that

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[9] The Court of Appeals for the District of Columbia Circuit has held that there is "no critical distinction between preemption by Title II regulation and preemption by the exercise of ancillary jurisdiction." *Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 217 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983). *See also California v. FCC*, 905 F.2d 1217, 1239-43 (9th Cir. 1990) (FCC's authority to preempt state regulation of enhanced services is unaffected by whether its own regulation arises under Title II or under its ancillary authority).

"pre-emption may result not only from action taken by Congress itself: a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation." *Id.* at 369. Thus, for example, pursuant to Section 2(b)(1) of the Communications Act of 1934, as amended, this Commission may preempt state regulation of intrastate communications when state decisions regarding intrastate communications would negate, thwart, or impede the exercise of lawful federal authority over interstate communications. *Id.* at 375; *Public Utility Commission of Texas v. FCC*, 886 F.2d 1325, 1331 (D.C. Cir. 1989); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

The removal of entry barriers was one of the key policies underlying the FCC's *Computer II Inquiry* decision to exclude enhanced service providers from Title II regulation. As the Commission explained,

> [W]e are convinced that *such a regulatory scheme offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network*. . . .With the nonregulation of all enhanced services, FCC regulations will not directly or indirectly inhibit the offering of these services, nor will our administrative processes be interjected between technology and its marketplace applications. . . . To the extent regulatory barriers to entry are removed and restrictions on services are lifted there is a corresponding potential for greater utilization of the telecommunications network. . . .

Computer II Inquiry, 77 FCC 2d at 428-430. Consistent with this policy to promote the full and efficient use of the interstate telecommunications network, in 1992 the Commission preempted an order of the Georgia Public Service Commission that "froze," or barred, BellSouth's offering of voice mail service in Georgia. *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation*, 7 FCC Rcd 1619 (1992) (*BellSouth MemoryCall*).

State regulation that erects entry barriers to the provision of money transfer service by record carriers would, like the Georgia order preempted in the *BellSouth MemoryCall* decision,

be inconsistent with the Commission's express policy. As such, it would be subject to federal preemption. Such state regulation does not raise an issue of state regulatory authority over intrastate communications; rather, it raises the issue of a state's impermissible attempt to assert authority over – and undermine the efficient utilization and full exploitation of – the interstate telecommunications network.

IV. THE DRAFT MODEL ACT, WHICH DELIBERATELY ERECTS POTENTIALLY INSURMOUNTABLE BARRIERS TO THE PROVISION OF AN INFORMATION SERVICE, VIOLATES FEDERAL POLICY

The National Conference of Commissioners on Uniform State Laws ("NCCUSL") is currently drafting a model state law that would establish significant, and potentially insurmountable, entry barriers to the provision of money transfer service by record carriers. In response to a "sense of Congress" regarding the need for state action to combat money laundering,[10] the NCCUSL is drafting a Uniform Money-Services Business Services Act (the draft or model "Act") that would *inter alia* (1) eliminate long-standing statutory exemptions found in many state laws pertaining to incorporated telegraph companies[11] and (2) impose substantial entry barriers, including licensing, bonding, and net worth requirements, on record

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[10] 31 U.S.C. § 5311(b).

[11] Exemptions applicable to money transfer services provided by incorporated telegraph companies are currently found in the state laws of Alabama, Arkansas, Colorado, Connecticut, the District of Columbia, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, and Wisconsin. These statutory exemptions, many of which are quite similar, are not interpreted in a consistent manner by the states, as the table attached hereto as Appendix A and letters attached hereto as Appendix B demonstrate.

carriers when they provide money transfer services.[12] Although the Draft Act lists exemptions "normally included in relevant state licensing statutes for money transmitters," the draft Act fails to include the telegraph company exemption currently found in numerous state laws.

Under proposed Part 2 of the draft Act, pertaining to the licensing of money transmitters, an entity must submit a detailed application, initial application and license fees of $4,000, a security device "acceptable to the [superintendent]" in an amount ranging from $50,000 to $500,000 (depending upon number of locations and the applicant's financial condition), and agree to an investigation of its "financial condition and responsibility, financial and business experience, character, and general fitness." *See* §§ 201, 202 (a) and (b), 203(a), 205(a). Further, the draft Act authorizes state licensing personnel to conduct an on-site investigation, the cost of which must be borne by the applicant. *See* § 203(a). Once licensed, the draft Act would require licensees to maintain a net worth between $100,000 and $500,000. *See* § 206. The draft Act establishes burdensome renewal procedures, including the annual submission of audited financial records, a listing of the licensee's "permissible investments," and fees. *See* § 204.

As the Reporter's Note to the draft Act acknowledges, these requirements – particularly the proposed bonding and net worth requirements – have been deliberately crafted to erect entry barriers to the provision of financial services by entities, including record carriers, subject to the draft Act. *See* Reporter's Note to proposed § 202. Unfortunately, these requirements will also bar the entry of some new entrants, including record carriers, whose sole "offense" may be their small size.

12/ The draft Act was formerly entitled the Uniform Nondepository Providers of Financial Services Act..

The entry restrictions that the NCCUSL proposes contravene the express policy statements repeatedly articulated in the Commission's *Graphnet Systems Order* in support of the unfettered competitive provision of record carrier services, including money transfer services:

> We are concluding here that an open entry policy in the public record service will benefit the public interest. . . . There is *no* public interest consideration to justify impeding these likely new entrants from being given the opportunity to bring new developments to the public. . . . [U]nless we remove current barriers to entry, the benefits of these developments are likely to be offered selectively. . . Thus, *an open entry policy will serve the public interest convenience, and necessity*. . . .
>
> * * * * *
>
> The record indicates that *the benefits of entry will outweigh any potential harms*. . . . The evidence on this record dictates that we should not let a single firm [Western Union] hold the key to innovations and control over what has been turned into a moribund sub-market. For this reason and for the reasons stated elsewhere in this decision, *we shall open this market to entry by carriers other than WUTC in order to achieve the purpose of the Communications Act.*
>
> * * * * *
>
> Now that we have authorized multiple entry, *there appear to be good reasons for us to minimize our regulatory involvement in this area*, with regard not only to new entrants but to Western Union as well. . . . *Excessive regulation would likely discourage entrants or add unnecessarily to the cost of their operations*. . . .
>
> * * * * *
>
> We have found that multiple entry in the domestic PMTS will better serve the public interest than Western Union's monopoly.

Graphnet Systems Order at 521, 523-24, 526 (emphasis added).

By granting this petition for declaratory ruling, the Commission can alert the NCCUSL that the draft Act violates federal communications policy applicable to record carriers providing money transfer services and that, absent an applicable exemption, any state act modeled on the Uniform Money-Services Business Act would be subject to limited federal preemption.

V. CONCLUSION AND PRAYER FOR RELIEF

Accordingly, Nevadacom respectfully requests that the Commission issue a declaratory ruling confirming that:

1. Telegraphic money order service, or money transfer service provided by record carriers, is an information service and subject to the Commission's ancillary jurisdiction;

2. States may not impose any law, rule, or regulation that acts to bar or inhibit the provision of money transfer service by record carriers; and

3. To the extent a state imposes any law, rule, or regulation that attempts to regulate the entry into or provision of money transfer services by record carriers, that state law, rule, or regulation is preempted by federal law to the extent necessary to correct such inconsistency with federal policy.

Respectfully submitted,
NEVADACOM, INC.

Glenn S. Richards
Susan M. Hafeli
Fisher Wayland Cooper Leader & Zaragoza LLP
2001 Pennsylvania Avenue N.W., Suite 400
Washington, D.C. 20006-1852
Telephone: (202) 775-3494
Facsimile: (202) 296-6518

Dated: 9/17/07

-17(F)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of) 34516

WESTERN UNION TELEGRAPH COMPANY) Transmittal No. 7485

Revisions to Tariffs F.C.C.)
Nos. 229 and 263)

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1980; Released: August 6, 1980

By the Chief, Common Carrier Bureau:

1. In a filing which became effective May 17, 1979, Western Union Telegraph Company (Western Union) cancelled its tariffs for Money Order Service. 1/ American Facsimile Systems, Inc. (AFSI) has petitioned for rejection of these revisions, claiming that Western Union cannot lawfully detariff this service unless it is to be offered through a fully separated subsidiary. For the reasons set forth below, we deny the petition.

2. In a basic money order service transaction, a customer at one location deposits with Western Union the amount to be sent, plus the service charge which includes a variable handling fee and a fixed charge for the telegram used to transmit necessary information about the transaction. Western Union then transmits a message to its office nearest the payee, which in turn prepares a money order draft to the specifications of the customer. The manner and time of notification and delivery vary with the type of money order being purchased. 2/ Numerous companies, including AFSI, use communications in conjunction with their own competing money transfer services. Such services are not regulated by the Commission and, accordingly, are not tariffed. Although Western

1/ The term Money Order Service, as used here, refers to all forms of service that Western Union formerly included in Tariff F.C.C. No. 229. Among the specific offerings described in that tariff were: Domestic Money Order Service, Commercial Money Order Service, Charge Card Money Order Service, and Outbound Money Order Service.

2/ For example, Western Union's tariff for Domestic Money Order Service (cancelled by this filing) provided that Western Union would either notify the payee to call at the telegraph office or agency to receive the money order, or, for an additional charge, would undertake delivery by messenger. By contrast, Western Union's Commercial Money Order Service made it the obligation of the customer to notify the payee of the availability of the money order draft.

Union has historically offered money order service under tariff and acknowledges that it formerly considered this treatment to be appropriate, it now adopts the view that its provision of money orders need not be deemed common carrier communications which must be tariffed pursuant to Section 203 of the Communications Act, 47 U.S.C. §203.

3. AFSI does not assert that money order services are common carrier communications which must be offered by tariff. Rather, it argues that Western Union's money order service is not a service which Section 43.54 of the Commission's Rules, 47 C.F.R. §43.54, contemplates being offered by a telegraph carrier on other than a tariffed basis. According to AFSI, that section is intended to contain a complete list of services which a telegraph carrier may provide without tariff. Therefore, it contends, if a telegraph carrier wishes to provide any service not mentioned in Section 43.54, the carrier must do so by means of a fully separated subsidiary. Furthermore, AFSI appears to invoke the Commission's Resale and Shared Use decision, 60 FCC 2d 261 (1976), recon. 62 FCC 2d 588 (1977), aff'd sub nom. American Telephone and Telegraph Company v. FCC, 572 F. 2d 17 (2d Cir. 1978), as support for the proposition that when a carrier offers regulated monopoly services, the Commission will only permit it to offer unregulated services under conditions of "maximum separation." This is the only means, states AFSI, to deprive Western Union of the "opportunity to cross-subsidize and commingle the operations of its substantial telegraph common carrier services and facilities."1/

4. In our view, the asserted bases for rejection are not convincing. To begin with, AFSI's interpretation of Section 43.54 of the Commission's Rules is erroneous. That section requires the filing of reports concerning services offered by a telegraph carrier which are not covered by its tariffs; it does not attempt to define the criteria for distinguishing between services which should or should not be tariffed. In point of fact, subsection (b) of the rules speaks of "services which may be covered by this section" and then proceeds to list various examples. (emphasis added) Clearly, therefore, this language cannot be said to define specific services which need not be tariffed.

5. We are also unpersuaded that formation of a separate subsidiary is a necessary precondition to detariffing money order service. As noted, AFSI interprets the Resale and Shared Use decision, supra, as a general Commission policy that maximum separation is required to prevent cross-subsidization between regulated communications

1/ AFSI also argues that Western Union has relied prematurely on the Commission's Notice of Proposed Rulemaking in Domestic Public Message Services, FCC 79-442, released July 23, 1979, as justification for the proposition that the Commission had already allowed competition in the provision of telegraph services. The Commission has since adopted a final order in that proceeding, implementing the proposed rules. Domestic Public Message Services, 45 FR 3037 (January 16, 1980), amended 45 FR 6584 (January 29, 1980). Accordingly, this objection is now moot.

services and other offerings. That decision, however, on reconsideration made it clear that separation requirements applied only to data processing services, consistent with the Commission's decision in the First Computer Inquiry. 4/ In fact, the Commission has weighed the costs and benefits to be derived from separation before requiring structural changes. Thus, in its final decision in the Second Computer Inquiry, FCC 80-189, released May 2, 1980, the Commission concluded that only the American Telephone and Telegraph Company and GTE Service Corporation had sufficiently great potential for anticompetitive behavior and misallocation of costs to warrant a requirement that these carriers provide enhanced service through a separated resale subsidiary. All other carriers, including Western Union, were found not to possess the considerable market power which gives rise to a need for structural separation. In addition, the Commission noted that the PMS decision, supra, has further reduced the capacity Western Union in particular might possess to engage in substantial anticompetitive conduct. See Second Computer Inquiry at para. 221.

6. We do not make light of potential opportunities for cross-subsidization of a competitive enhanced service by a carrier which also supplies basic transmission offerings. However, the Second Computer Inquiry establishes a mechanism for inhibiting such behavior. It requires, at paragraph 231, that

> . . .those carriers that own common carrier transmission facilities and provide enhanced services, but are not subject to the separate subsidiary requirement, must acquire transmission capacity pursuant to the same prices, terms and conditions reflected in their tariffs when their own facilities are utilized.

This assures that non-discriminatory access to basic transmission facilities is available to all enhanced service providers.

7. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that the petition to reject filed by American Facsimile Systems, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Philip L. Verveer
Chief, Common Carrier Bureau

4/ Regulatory & Policy Problems Presented by the Interdependence of Computer and Communications Services & Facilities, 28 FCC 2d 291 (1970) (Tentative Decision); 28 FCC 2d 267 (1971) (Final Decision), aff'd in part sub. nom. GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973), decision on remand, 40 FCC 2d 293 (1973).